Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket No. 04-416
Pursuant to 47 U.S.C. § 160(c) Pertaining to	)	
Qwest's xDSL Services	)	

OPPOSITION OF AT&T TO PETITION OF QWEST CORPORATION FOR FORBEARANCE PURSUANT TO 47 U.S.C. § 160(c) PERTAINING TO xDSL SERVICES

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Pursuant to the Commission's Public Notice in the above-captioned docket,[1] AT&T Corp. ("AT&T") hereby submits this Opposition to the petition of Qwest Corporation ("Qwest") seeking forbearance pursuant to 47 U.S.C. § 160(c) pertaining to xDSL services.[2]

I. INTRODUCTION AND SUMMARY

Qwest's Petition is yet another Bell attempt to force an end-run around current Commission proceedings that are properly designed to conduct a comprehensive review of the regulatory rules and requirements that affect broadband and information services competition. Such a comprehensive review is essential, because effective *retail* services competition cannot exist unless non-affiliated broadband services and applications providers ("non-affiliated broadband providers") have just, reasonable and

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[1] *See* Public Notice, WC Docket No. 04-416 (November 16, 2004).

[2] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) Pertaining to Qwest's xDSL Services, WC Docket No. 04-416, DA No. 04-3602, (filed November 10, 2004) (the "Petition").

nondiscriminatory *wholesale* access to incumbent LEC transmission facilities and services that are necessary inputs to competitive retail offers. In contrast, the kind of piecemeal relief that Qwest and other Bells seek is antithetical to the development of fully competitive retail markets for broadband and information services.

Qwest's Petition, as other recent Bell requests for broadband forbearance, provides evidence regarding only a narrow slice of the marketplace and asks the Commission to grant broad retail and wholesale relief based on assertions regarding the need for "regulatory parity" that implicitly -- but falsely -- assume that all broadband providers have equivalent ability to access consumers with broadband connectivity. Notably absent from the Petition is any assessment of the full impact that the requested relief would have on consumers, competitors and competition generally. The reason for this void is simple: if all of those impacts were revealed they would require the Commission to deny the Petition, because the evidence clearly shows that Qwest's request fails to meet the rigorous requirements of Section 10.

Qwest's Petition is yet another example of a Bell request for forbearance that, if granted, would (at best) subject consumers to duopoly retail competition. In particular, the Petition ignores non-affiliated broadband providers' near-total lack of wholesale options to incumbent LEC transmission facilities and services, claiming instead that retail competition from cable suppliers is sufficient to relieve the Bells of regulations that have long proved necessary to keep the retail marketplace open to competition. But retail cable competition (where it even exists) is only part of the story. As the other Bells, Qwest ignores that it alone controls access to vital transmission facilities and services that are necessary to support broadband and information services competition, and that it has *both* the incentive *and* the ability to exercise its enormous power over the wholesale market to prevent consumer choice and stifle competition and innovation in retail markets.

Indeed, the Commission has long recognized that retail competition is critically dependent on the availability of wholesale access to basic transmission facilities and services. And longstanding Commission policy is based on the sure knowledge that wholesale access cannot be a reality without regulatory rules that mandate just, reasonable and nondiscriminatory access to those facilities and services. In today's market, only the incumbent LECs have ubiquitous access to end users. As a result, the incumbents are able to hold their rivals hostage and to limit -- and even cripple -- competitive retail services that are necessary to discipline the ILECs' (and any cable provider's) retail offerings. As a result, the Commission cannot properly review any Bell request for forbearance, whether from retail or wholesale rules, without considering the effects the requested relief would have on both wholesale and retail markets.

Qwest's forbearance request is entirely inadequate, because it fails to demonstrate that the rules it seeks to avoid are unnecessary to ensure that rates, terms and conditions for its services will remain just, reasonable and nondiscriminatory; to protect consumers; or to promote the public interest. Indeed, its evidence at most shows the grant of the requested relief would result in duopoly retail competition in *some* markets for *some* customers. That is simply insufficient to support its broad request for relief, either from the Commission's tariffing and rate averaging rules or from the resale requirements of Sections 251(c)(4) and 252(d)(3).

In particular, as shown in Part II.A below, Qwest's Petition fails to comply with Section 10(a) because the tariffing and rate averaging requirements are necessary to ensure that the rates, terms and conditions of Qwest's retail services are just, reasonable and nondiscriminatory. Contrary to Qwest's claims, if its petition were granted, Qwest would inevitably abuse its monopoly control over last-mile wholesale broadband transmission facilities to foreclose competition in the "downstream" retail markets for DSL and other broadband services by subjecting potential competitors to anti-competitive practices such as price squeezes. Indeed, as the Commission has found, ILECs have used precisely such anti-competitive tactics to monopolize downstream retail markets for both special access and long distance services where ILECs have possessed monopoly control of essential wholesale inputs. The market for DSL and other broadband services is no different, and the tariffing and rate averaging requirements are necessary to ensure Qwest does not exercise its monopoly power to impose unjust, unreasonable, and discriminatory rates, terms and conditions on end users.

Part II.B shows that because Qwest undeniably possesses monopoly control over critical last-mile broadband transmission inputs that non-affiliated broadband providers need in order to offer DSL and other broadband services, forbearance from the subject regulations would further Qwest's ability to act on its clear incentives to restrict competitive choice at the retail level. Moreover, the evidence shows that if the Petition were granted and non-affiliated broadband providers are eliminated, mass market consumers will at best be subject to duopoly control over the broadband services. Thus, continued enforcement of the subject regulations is necessary to protect consumers. Finally, Part II.C refutes any notion that granting Qwest's request for forbearance would be in the public interest, and specifically shows that Qwest's "regulatory parity" claims are meritless.

Part III below demonstrates that Qwest's request for forbearance from the avoided cost wholesale discount requirement of Sections 251(c)(4) and 252(d)(3) is totally baseless and cannot be granted under any circumstances. Not only does this request fail the Section 10(a) requirements, but it also is unnecessary to enable Qwest to achieve its purported objectives, *i.e.*, to be able to enter commercial agreements and to offer contract tariffs. And notably, Qwest suffers no economic harm from the continuation of the avoided cost discount requirement, because this limited form of discount -- which is totally unlike any discount that would operate in a competitive market -- permits Qwest to retain its *entire* retail profit on all wholesale accounts. Moreover, the requested relief is barred by Section 10(d), because requests for forbearance from Section 251(c) and 271 cannot be granted until those sections are fully implemented.

Finally, Part IV demonstrates that if, despite the lack of evidence supporting Qwest's forbearance requests, the Commission decides to grant any form of relief, the Commission must impose requirements that ensure that Qwest cannot engage in anticompetitive behaviors that could impede retail competition from non-affiliated broadband providers, and must assure that Qwest provides retail xDSL services in a manner that ensures consumer choice of broadband services, capabilities, and content.

II. QWEST HAS NOT SATISFIED THE REQUIREMENTS FOR FORBEARANCE FROM DOMINANT CARRIER TARIFF REGULATION OR RATE AVERAGING WITH RESPECT TO xDSL SERVICES

Qwest's first request is that the Commission forbear from enforcing dominant carrier tariff and rate averaging requirements with respect to its offer of mass-market xDSL services to end users.[3] Qwest's request is both facially and substantively deficient and should be rejected.

As explained in detail in AT&T's recent opposition to BellSouth's request for forbearance from *Computer Inquiries* and Title II regulation for broadband services,[4] the proponent of forbearance under Section 10(a)[5] must make three "conjunctive" showings, and the Commission *must* "deny a petition for forbearance if it finds that *any one* of the three prongs is unsatisfied."[6] First, the proponent must show that enforcement of the identified regulations to the specific services at issue "is not necessary to ensure that the charges, practices, classifications, or regulations by, for or in connection with that telecommunications carrier or telecommunications service are just and reasonable and not

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[3] Petition at 5.

[4] *See, e.g.*, In the Matter of Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of *Computer Inquiry* and Title II Common-Carriage Requirements, WC Docket No. 04-405 ("BellSouth Forbearance Proceeding"), Comments of AT&T at 26-31 (filed December 20, 2004) ("AT&T BellSouth Forbearance Opposition"). AT&T's comments in that proceeding are incorporated by reference and appended hereto as Attachment 1.

[5] 47 U.S.C. § 160(a).

[6] *CTIA* v. *FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (emphasis added); *see also* AT&T BellSouth Forbearance Opposition at 26.

unjustly or unreasonably discriminatory."[7] Second, it must show that enforcement of those regulations "is not necessary for the protection of consumers."[8] Third, it must show that non-enforcement of those regulations "is consistent with the public interest"[9] and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."[10] Moreover, because these criteria focus on the protection of both competition and consumers, courts and the Commission have all recognized that the Commission must examine *detailed empirical evidence* concerning *specific market conditions* that apply to the particular regulations and services at issue. The Petition fails to satisfy these requirements.

As a preliminary matter, the Commission need not even examine any of the specific requirements of Section 10(a) before rejecting the Petition. The courts have held that forbearance of dominant carrier regulation under Section 10 *demands* "a painstaking analysis of market conditions" supported by empirical evidence,[11] including the geographic and product markets. Critically, this market analysis is *required*; the Commission may not simply assume that in the absence of the identified regulations "market conditions or any other factor will adequately ensure that charges . . . are just and

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[7] 47 U.S.C. § 160(a)(1).

[8] *Id.* § 160(a)(2).

[9] *Id.* § 160(a)(3).

[10] *Id.* § 160(b).

[11] *WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp.* v. *FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001).

reasonable and are not unjustly or unreasonably discriminatory."[12] Like other Bell forbearance requests,[13] the Petition provides no meaningful data that would allow the Commission to define and analyze the relevant geographic broadband markets, which are undeniably local.[14] While the Petition tosses up some generic state data in addition to re-hashed national data, it wholly ignores the local geographic markets that are the crux of the Commission's required analysis. Indeed, any such analysis of local markets is simply impossible on the record Qwest has presented. As a result, the Commission must reject the Petition on its face for failure to provide the factual predicate necessary to support forbearance.

But even if the Commission were to consider the Petition on the merits, it must reject the Petition on that basis as well. Section 10(a) requires the Commission to "deny a petition for forbearance if it finds that any one of the three prongs [of the statutory forbearance test] is unsatisfied."[15] Qwest's Petition fails to satisfy any of those requirements.

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[12] *1998 Biennial Regulatory Review – Review of ARMIS Reporting Requirements*, Report and Order, Fifth Memorandum Opinion and Order, 14 FCC Rcd. 11443, ¶ 32 (1999).

[13] *See, e.g.*, WC Docket No. 04-405, Petition of BellSouth Telecommunications, Inc. (filed October 27, 2004) ("BellSouth Forbearance Petition").

[14] *See, e.g.*, AT&T BellSouth Forbearance Opposition at 29 & n.63.

[15] *CTIA* v. *FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

A. The Regulations from Which Qwest Seeks Forbearance Are Necessary to Ensure Just, Reasonable and Nondiscriminatory Rates, Terms and Conditions

Competition in the provision of retail mass-market xDSL services and applications is critically dependent on access to the wholesale transmission services necessary to provide such services, a market that Qwest currently monopolizes. Thus, Qwest's request for forbearance from dominant carrier tariff and rate averaging requirements for mass-market xDSL services for end users cannot be viewed in isolation from its request for forbearance from the resale requirements of sections 251(c)(4) and 252(d)(3). And when the effects of Qwest's combined requests on *both* retail *and* wholesale broadband markets are considered, it is clear that its Petition fails to meet the requirements of Section 10(a)(1).

Section 10(a)(1) requires Qwest to demonstrate that enforcement of dominant carrier tariff regulations and rate averaging requirements are not necessary to ensure the provision of just, reasonable, and non-discriminatory rates, terms, and conditions. However, Qwest does not even attempt to demonstrate the existence of meaningful competition for *wholesale* last-mile broadband transmission facilities and services, which are necessary to ensure just, reasonable, and non-discriminatory rates, terms, and conditions in the provision of retail broadband services and applications. Nor could it do so.

In the vast majority of cases, non-affiliated providers of broadband services and applications ("non-affiliated broadband providers") simply do not have any way of providing their competitive services without access to ILEC last-mile facilities, because they rarely have access to competitive alternatives outside the incumbents' networks. As shown in the numerous oppositions to the BellSouth Forbearance Petition,[16] cable providers do not provide wholesale broadband access alternatives that are sufficient to constrain the Bells' market power over inputs needed by non-affiliated broadband providers. Thus, the Bells' claims that *retail* cable modem service offers an antidote for their monopoly control over *wholesale* broadband transmission services have been exposed as highly exaggerated and fundamentally wrong.[17] And it is also clear that other forms of intermodal competition do not offer non-affiliated broadband providers meaningful wholesale alternatives. Despite the Bells' hype, non-affiliated broadband providers cannot use satellite or wireless broadband facilities as alternatives to the Bells' networks.[18] Indeed, even leading carriers that attempted to deploy fixed wireless have described their efforts as "failures,"[19] and the two principal satellite providers have been so unsuccessful that both have found it necessary to partner with the Bells.[20] In addition, satellite and wireless providers generally do not even offer unbundled broadband

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[16] *See, e.g.*, AT&T BellSouth Forbearance Opposition at 32-35; WC Docket No. 04-405, Opposition of CompTel/Acsent at 11-12 (filed December 20, 2004); Opposition of Information Technology Association of America at 5-7 (filed December 20, 2004); Comments of EarthLink, Inc. at 19-20 (filed December 20, 2004); Comments of Washington Bureau for ISP Advocacy at 24-27 (filed December 20, 2004); Comments of Vonage Holdings Corp. at 14-18 (filed December 20, 2004).

[17] *See* Petition at 8-10; AT&T BellSouth Forbearance Opposition at 41-42.

[18] *See, e.g.*, AT&T BellSouth Forbearance Opposition at 35-36.

[19] *See, e.g.*, WC Docket No. 04-313, Comments of Loop and Transport CLEC Coalition, Tirado Decl. at 11-13 (filed October 4, 2004).

[20] *See generally* AT&T BellSouth Forbearance Opposition at 35-36.

transmission services to non-affiliated broadband providers, and broadband over power line access (known as "BPL") is still a concept, not a reality.[21]

Nor can non-affiliated broadband service providers realistically turn to competitive wholesale carriers that have self-deployed their own facilities. Competitive deployment of alternative transmission facilities, particularly local loops, is extremely limited, and ILECs have used their monopoly control of last-mile facilities to squelch potential competition in the market for wholesale special access facilities. As a result, there are few -- and typically no -- competitive wholesale carriers that deploy any significant number of last mile loops to residences except for occasional multiple dwelling units.[22] Thus, non-affiliated DSL and other broadband providers remain critically dependent upon Qwest's and other ILECs' last-mile high-speed transmission facilities to provide broadband services and applications.

The ILECs' monopoly control of last-mile broadband facilities has important implications for competition in both the wholesale and retail broadband markets. The ILECs' control over bottleneck wholesale broadband facilities enables them to discriminate in the provision of wholesale telecommunications services to firms that compete against them in "downstream" retail markets. For example, the market evidence shows that ILECs have proven only too willing to use their monopoly control of last-mile monopoly facilities to increase their special access rates to levels that make it virtually

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[21] *See, e.g.*, AT&T BellSouth Forbearance Opposition at 35-36, 42.

[22] *See, e.g.*, *id.* at 37.

impossible for rival carriers to compete, and that they also hamper rivals with poor quality interconnections and unnecessary delays.[23]

And there is even more recent evidence that ILECs will in fact discriminate in the provision of wholesale services to firms that seek to compete against them in "downstream" retail markets. Just last month, the Commission found that BellSouth had engaged in unlawful discrimination in the provision of special access service -- an essential input for retail long distance service provided to enterprise customers -- by offering greater discounts to BellSouth's long-distance affiliate than to BellSouth's non-affiliated long-distance competitors.[24] The ILECs' continuing pattern of anti-competitive activities conclusively shows that they will in fact abuse their monopoly control over last-mile wholesale broadband transmission facilities to foreclose competition in the retail markets for DSL and other broadband services, just as surely and brazenly as they have done in the retail markets for both special access and long distance services.[25]

Qwest's Petition asks the Commission to reduce the tariff and rate-averaging regulation of Qwest's offer of xDSL services to retail mass-market customers, without offering any consideration of the wholesale market for such services. But the Commission cannot so neatly cordon off its analysis and focus exclusively on Qwest's

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[23] *See, e.g., id.* at 38.

[24] *See AT&T Corp. v. BellSouth Telecommunications, Inc.,* Memorandum Opinion and Order, FCC 04-278, EB-04-MD-010 (Dec. 9, 2004).

[25] The ILECs' continuing discrimination against retail special access and long distance competitors utterly belies Qwest's claim that it has irresistible economic incentives to provide non-affiliated broadband providers with just, reasonable, and non-discriminatory rates, terms, and conditions.

offer of retail DSL services, because Qwest -- like other ILECs -- is the only viable supplier of last-mile wholesale DSL transmission. In order to ensure vibrant competition in the retail market, the Commission must therefore assure that Qwest offers xDSL retail service in a manner that (i) ensures wholesale broadband transmission will be available to competing DSL and broadband providers on just, reasonable, and non-discriminatory rates, terms, and conditions and (ii) does not allow Qwest to engage in anticompetitive conduct such as price squeezes that will seriously foreclose retail competition.

Granting Qwest's request to forbear from dominant carrier tariff regulation of Qwest's retail mass-market xDSL services will not ensure just, reasonable, and non-discriminatory rates, terms and conditions in the wholesale market. In particular, granting the petition would leave Qwest subject only to non-dominant tariff regulation for its retail mass-market xDSL services and would not require it to provide cost justification for its rates. As a result, Qwest would be permitted to file presumptively lawful tariffs on only one day's notice. But given Qwest's (and other ILECs') monopoly control over essential inputs to competitive retail services, combined with its strong incentives to use that control to impose price squeezes on rival retailers, that would leave it free to act anticompetitively in ways that could devastate retail competition.

As a result, if Qwest's Petition were granted, it could, for example, use the tariff filing flexibility that it has requested to establish an artificially low price for its retail DSL service that is extremely close to, or even below, the price for its "bulk" wholesale DSL service. Such anti-competitive pricing -- which would not need to be cost-justified -- would "squeeze" DSL competitors, who *must* purchase last-mile DSL transmission from Qwest by virtue of its monopoly, eventually displacing those very competitors from the "downstream" retail DSL market. And, once it is successful in driving potential DSL competitors from the retail market, Qwest could use its tariff filing flexibility to raise retail DSL for end users, subject (at most) to duopoly pricing competition from a cable supplier -- if there is even one available.[26] Thus, granting the relief sought by Qwest in the Petition will not ensure that end users continue to have access to just, reasonable, and non-discriminatory rates, terms, and conditions.

Moreover, the rate de-averaging relief Qwest seeks[27] presents yet another danger to retail DSL competitors and competition generally. If the Commission were to simply grant Qwest's request for retail rate de-averaging relief, Qwest could quickly and drastically lower DSL rates retail rates in urban areas, where most DSL customers are found, due to the combination of demographic distribution and shorter loop lengths. If Qwest then retained "bulk" wholesale DSL rates at their current, higher levels in those same urban areas, the resulting price squeeze would devastate facilities-based DSL competitors and competition, as described above. Further, as explained in greater detail in Section III below, grant of Qwest's request for forbearance from the avoided cost discount mandated by Sections 252(c)(4) and 252(d)(2) could further foreclose DSL competition, by precluding non-facilities-based DSL providers from competing with Qwest in the provision of DSL services on a resale basis.[28] Thus, granting the relief

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[26] *See* Part II.B below.

[27] Petition at 20-23.

[28] Even the continued availability of the avoided cost discount mandated by Sections 252(c)(4) and 252(d)(2) would be of little value to facilities-based DSL competitors in the event of a price squeeze. These competitors would suffer crushing losses in stranded

(footnote continued on next page)

sought by the Petition will not ensure just, reasonable, and non-discriminatory rates, terms, and conditions in *either* the retail *or* wholesale markets.

B. The Regulations from Which Qwest Seeks Forbearance Are Necessary to Protect Consumers

The Petition also fails to satisfy Section 10(a)(2), which requires Qwest to demonstrate that enforcement of dominant carrier tariff requirements and rate averaging are not necessary to protect consumers. As shown above, Qwest undeniably possesses monopoly control over critical last-mile broadband transmission inputs that non-affiliated broadband providers need in order to offer retail DSL and other broadband services. Moreover, the market evidence is clear that Qwest has both the incentive and ability to discriminate against DSL and other broadband rivals and to impede competition in the "downstream" retail market for DSL services, and that it will take advantage of any opportunity to do so. Further, forbearance from the subject regulations would empower Qwest to exercise its market power to severely restrict competitive choice. Thus, the regulations from which Qwest seeks forbearance are clearly necessary to protect consumers.

Indeed, it bears noting here that, while consideration of the wholesale last-mile broadband transmission market is central to the Commission's consideration of broadband regulation, Qwest's claims concerning the competitiveness of the retail broadband services market are exaggerated. First, the evidence shows that there is almost

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(footnote continued from previous page)

investment if forced to shift to a pure resale business model by Qwest's imposition of a price squeeze with respect to last-mile monopoly wholesale DSL transmission.

no intermodal competition in the provision of retail broadband services to small businesses.[29] And in the residential retail market, cable and DSL do not, as Qwest suggests,[30] ubiquitously compete on a head-to-head basis. Indeed, many residential customers do not even have access to cable modem Internet access services.[31] And, contrary to Qwest's claims, satellite and wireless services cannot check ILEC dominance. The reality is that consumers do not view these alternative providers as serious competitive alternatives to the Bells' DSL service. Indeed, on a combined basis, these platforms provide a *de minimis* and *declining* share of broadband services.[32] The Commission's own statistics show that satellite/fixed wireless providers have seen their tiny share of "high-speed" and "advanced service" lines *fall* by *more than half* from 1999 to 2003.[33] Independent analyst estimates corroborate the Commission's figures.[34]

And in all events, the existence of cable companies shows, at best, a potential duopoly in the retail market, which the courts and the Commission have routinely rejected as a sufficient basis to promote vigorous competition and to protect consumers.

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[29] *See, e.g.,* AT&T BellSouth Forbearance Opposition at 41.

[30] *See* Petition at 14-17.

[31] *See, e.g.,* AT&T BellSouth Forbearance Opposition at 41.

[32] *See, e.g., High Speed Services for Internet Access: Status as of December 31, 2003,* FCC Industry Analyst and Technology Division, Tables 1 - 4 (rel. June 2004).

[33] The combined satellite/fixed wireless share fell from 2.8% to 1.3% (*id.*, Chart 6) and the combined advanced services share fell from 0.7% to 0.3% (*id.*, Chart 7). BPL does not even have a measurable share.

[34] Gartner, Inc., *U.S. Consumer Broadband Keeps Growing: Online Households Remain Steady* (Jan. 2, 2004), at 7 (in 2003 broadband modalities other than DSL and cable altogether accounted for only 4% to 6% of the market share.); Stat/MDR, *Reaching Critical Mass: The US Broadband Market* (Mar. 2004), at 19 (estimating satellite broadband subscribers to be 310,000 at the end of 2003).

rejected as a sufficient basis to promote vigorous competition and to protect consumers. Both economic theory and Commission precedent teach that strong anticompetitive incentives are *not* overcome by mere duopoly competition,[35] because *both* participants are likely to have the incentive and ability to maintain prices above competitive levels, instead of competing ruthlessly with each other -- *regardless* of their relative markets shares.[36] For this reason, the Commission held in the *EchoStar Merger Order* that "existing antitrust doctrine suggests that a merger to duopoly . . . faces *a strong presumption of illegality*."[37] Supreme Court precedent also establishes that duopolies presumptively violate antitrust standards and cannot meet the objectives of the Telecommunications Act,[38] which include the promotion of effective broadband services competition for the benefit of consumers.

[35] *See EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002) ("[E]xisting antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality."); *id.*, Statement of Chairmen Powell ("At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands."). *Accord FTC* v. *H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001).

[36] *See* United States Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines*, Section 2 (rev. Apr. 8, 1997). Thus, Bell arguments concerning relative market shares of ILECs and cable modem providers are not pertinent to the analysis.

[37] *EchoStar-DirecTV Merger Order*, 17 FCC Rcd 20559, ¶103 (2002) (emphasis added).

[38] *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 880-82 (2004).

C. Qwest's Petition is Not in the Public Interest

Nor would granting Qwest's Petition be in the public interest. Because, as shown above, Qwest retains monopoly control of last-mile wholesale broadband transmission facilities, granting the forbearance relief sought by the Petition will harm both competition and consumers and will disserve the public interest.

It is also essential to recognize that the Bells' ceaseless demands for "regulatory parity" -- which Qwest repeatedly alludes to in the Petition[39] -- are empty rhetoric. Contrary to the Bells' simplistic and narrowly drawn arguments, an analytically consistent approach to regulation does *not* require the Commission to blindly apply identical rules to different firms that are subject to different conditions, even when they offer substitutable products.[40] And there plainly are important technical, legal and market differences between cable and local telephone networks and services that support the application of different regulations to cable and telephone network providers.[41]

First, the Bells' networks were designed for, and have always been operated to provide, point-to-point common carrier communications, and the Bells and other incumbent LECs have for decades been required to provide equal and nondiscriminatory

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[39] Petition at 1-3, 5-11.

[40] *See Public Service Company of Oklahoma Request for Declaratory Ruling, Declaratory Ruling*, 3 FCC Rcd. 2327, ¶ 21 (1988) ("Public Service Company") (services provided over private utility network did not have to be subject to the same regulatory regime as Bell local services just because the services were substitutable and competitive).

[41] *See, e.g.*, *Appropriate Framework For Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, FCC 02-42, 17 FCC Rcd. 3019 at ¶ 7 (2002) ("legal, market, or technological distinctions may *require* different regulatory requirements between platforms") (emphasis added).

access to all consumers, interexchange carriers and ISPs. As a result, there are well-established systems, processes, and rules in place for accomplishing that objective in a commercially viable manner.[42] Thus, continuation of nondiscrimination requirements applicable to the Bells and other incumbent LECs do not create technological or operational risks. Instead, they merely ensure that these companies do not exploit their market positions to skew the provision or pricing of services or to discriminate against any customers, either in wholesale or retail markets. Continuing the *status quo* and requiring Qwest to offer basic telecommunications services, both broadband and narrowband, on a common carrier thus basis raises no possible network or service reliability/viability concerns. In contrast, cable systems were established to provide point-to-multipoint video programming, and there are no established systems or processes that support comparable access to cable facilities.

Second, there are important legal differences between cable companies and incumbent LECs. Congress specifically rejected the use of a common carrier approach in Title VI of the Telecommunications Act, which covers cable services. In stark contrast, Title II and the Commission's regulations have always required incumbent LECs (and all other telecommunications carriers) to provide competitors nondiscriminatory access to their networks in order to introduce and sustain competition in formerly monopoly

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[42] In fact, DSL-based services are not materially different from older "pair gain" technologies and have long been provided on a common carrier basis over the very same wires as voice and other traditional common carrier services. *See, e.g.,* CC Docket No. 02-33, Comments of AT&T, Chandler Decl. at ¶¶ 24-36 (filed May 3, 2002).

markets.[43] Indeed, the Supreme Court expressly held that the "provisions of the Telecommunications Act [of 1996] . . . were intended to *eliminate the monopolies* enjoyed by the inheritors of [the Bell System's] local franchises; this objective was considered both *an end in itself* and an important step toward the Act's other goals of boosting competition in broader markets and revising the mandate to provide universal service."[44]

Third, the competitive situations facing cable companies and ILECs in their core markets are significantly different. Unlike the ILECs, cable operators face vigorous competition in all of the businesses in which they compete, especially their provision of core video programming services. There are thus clear justifications for the very different legal regimes Congress established under Titles VI and II, and principled application of the "same analytical framework" supports the adoption of different rules for cable and telephone-delivered broadband services.

Qwest and the other Bells, however, pick and choose their way through selective arguments in their efforts to support adoption of a results-oriented version of "regulatory parity" that ignores these differences, complaining all the while that they cannot compete unless they are regulated "exactly the same" as cable companies. But it is obvious that

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[43] *See, e.g.,* 47 U.S.C. §§ 201, 202, 251, 252; Final Decision and Order, Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Service and Facilities, 28 FCC 2d 267 (1971) ("*Computer I*"); Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980)("*Computer II*"); Amendment of Section 64.702 of the Commission's Rules and Regulations -- Phase I, Report and Order, 104 FCC Rcd 958 (1986) ("*Computer III*").

[44] *Verizon Communications, Inc., v. FCC*, 122 S.Ct. 1646, 1654 (2002) (emphasis added).

the Bells want *only* the benefits -- and none of the burdens -- of cable regulation, because their arguments continually ignore that cable systems are subject to a host of substantial regulatory burdens that the Bells do not face – and do not propose to accept. For example, the Bells ignore that cable companies must comply with local franchising requirements and pay billions of dollars in annual franchise fees.[45] In addition, cable companies often must build and donate "institutional networks" to franchising authorities; they are subject to "must-carry," PEG, and other regulations – and unlike the Bells' network sharing obligations, these cable sharing obligations are uncompensated.[46] The Bells' version of "parity" is thus highly one-sided and skewed.

In all events, it is simply false that Qwest and the other Bells "cannot compete" if cable and Bell services are subject to different regulations that are justified by different circumstances. Most notably, the evidence is overwhelming that "regulatory burdens" have not kept the Bells from competing effectively where they choose to do so. It was, after all, the Bells, not cable providers, that sat on the implementation and deployment of DSL technology, preferring to protect their narrowband monopolies for as long as possible. But after sitting on DSL technology for decades, the Bells have enjoyed great success when and where they have decided to compete in earnest. Thus, Qwest and the

[45] *See* Roll Call, July 23, 2001 (statement of Rep. John Conyers and Chris Cannon); *see also* Comments of AT&T, *Request for Comments Deployment of Broadband Networks and Advanced Telecommunications*, Docket No. 011109273-1273-01 (National Telecommunications and Information Administration, Department of Commerce) (Dec. 19, 2001).

[46] *See* 47 U.S.C. §§ 531-32, 534-36.

other Bells are hardly correct that their second-place position in broadband access is the result of any regulatory requirements.

In sum, as with all complex issues, the Commission cannot legitimately analyze the Bells' "regulatory parity" arguments based on their simplistic rhetoric. And when the Bells' arguments are examined in light of all the relevant facts they are revealed as both self-serving and baseless, and blind adoption of the special type of regulatory parity the Bells urge would clearly disserve the public interest.

III. THE COMMISSION MAY NOT FORBEAR FROM REQUIRING QWEST TO OFFER xDSL SERVICES AT THE AVOIDED COST RESALE DISCOUNT MANDATED BY SECTIONS 251(C)(4) AND 252(D)(3)

Qwest's request that the Commission forbear from requiring Qwest to offer mass-market xDSL services to competitors at the avoided cost wholesale discount mandated by Sections 251(c)(4) and 252(d)(3) of the Telecommunications Act[47] is baseless and must be denied.

Despite Qwest's inflated rhetoric regarding other retail providers of cable, satellite, and wireless services, the fact remains that these carriers simply do not offer viable wholesale alternatives to the ILECs' last-mile wholesale DSL transmission. Thus, Qwest undeniably possesses the ability and incentive to discriminate against non-affiliated rivals in the retail mass-market for xDSL services.

The avoided cost wholesale discount mandated by Sections 251(c)(4) and 252(d)(3) is intended to ensure that competitors are able to obtain nondiscriminatory

[47] Petition at 23-27.

access to ILEC monopoly wholesale services. Given Qwest's irrefutable market dominance, retention of the avoided cost wholesale discount is necessary to ensure that efficient, non-facilities-based competitors have the opportunity to obtain wholesale broadband transmission services that will allow them to offer competitive alternatives to retail xDSL mass-market customers. This in turn is necessary to enable intramodal competitors to discipline Qwest's (and possibly a cable supplier's) offer of retail mass-market xDSL services to end users. These considerations clearly mandate continuation of the wholesale requirement, and eliminating them would be inconsistent with each of Section 10(a)'s requirements. In particular, they are necessary to ensure (i) that Qwest's wholesale rates remain just, reasonable, and non-discriminatory (Section 10(a)(1)); (ii) that the wholesale market is protected so that consumers may benefit from effective retail competition (Section 10(a)(2)); and (iii) the public interest is advanced through the promotion of competition (Section 10(a)(3)).

In contrast, granting Qwest's forbearance request clearly will not satisfy these requirements. If Qwest were granted unwarranted relief from its tariffing and rate-averaging obligations, enabling Qwest to impose a price squeeze that devastates facilities-based competitors, and the Commission also forbore from requiring Qwest to offer mass-market xDSL services to competitors at the avoided cost wholesale discount, both facilities-based and resale-based DSL competition would be seriously impeded. This would neither promote broadband deployment nor serve the interests of consumers or the public.

And critically, there are no significant benefits that would result from granting the requested relief. In particular, forbearance from the avoided cost discount is not necessary to allow Qwest the freedom it seeks to negotiate commercial agreements with carrier customers.[48] Nothing in Sections 251(c)(4) and 252(d)(2) precludes Qwest from entering into voluntary commercial deals with carriers that wish to waive any rights they may otherwise have under those statutory provisions. Nor is there any statutory restraint on Qwest's ability to offer contract tariffs for wholesale DSL services. And to the extent Qwest believes that there may be some restrictions on contract tariffs in the Commission's rules,[49] the solution is not to strip away the statutorily-mandated wholesale discounts mandated by Sections 251(c)(4) and 252(d)(2), but rather to seek to clarification or modification of the specific Commission's rules or to request a waiver of those rules.

Moreover, Sections 251(c)(4) and 252(d)(2) do not cause Qwest to incur any significant economic costs. To the contrary, the avoided cost discount defined in 252(d)(2) only subtracts Qwest's avoided costs of *retailing*. As the Eighth Circuit held, "it is only those continuing costs of providing retail telephone service which will [actually] be avoided by selling to the competitor the services it requests which are to be excluded" from the retail rate. *Iowa Utilities Board et. al. v. FCC* , 219 F. 3d 744, 754-55 (8th Cir. 2000). Thus, the wholesale rate that Qwest may charge competitors under the avoided cost discount reflects only the retail costs that Qwest will actually avoid by

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48 *See* Petition at 23.

49 *See* Petition at 14 & n.62.

selling the service to a competitive carrier at wholesale, and allows Qwest to retain on average the *same* net profits it earns from its retail service.[50]

The Petition is also fatally premature in seeking forbearance with respect to the requirements contained in sections 251(c)(4). Section 10(d) places an explicit "[l]imitation" on the remainder of section 10, providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented."[51] The Commission considers section 10(d) as a "threshold matter" in forbearance proceedings, and a petitioner's failure to satisfy its requirements mandates denial of the petition without consideration of its merits.[52]

Qwest has not demonstrated that the requirements of sections 251(c) and section 271 have been "fully implemented." Nor could it. The objectives and purposes of the Act require that section 251(c) and 271 not be deemed "fully implemented" until, at a minimum, there is ubiquitous availability of cost-based wholesale alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets. The word "implement" means "to carry

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[50] The avoided cost discount is thus completely different from wholesale discounts that are common in competitive markets, which are typically based on all of the wholesaler's relevant costs (including the costs of producing for wholesale) and that suppliers in a competitive market willingly embrace as part of their distribution strategy.

[51] 47 U.S.C. § 160(d).

[52] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, 18 FCC Rcd. 23525, ¶¶ 5, 9 (2003) ("*Verizon Forbearance Order*").

into effect, fulfill, accomplish" and to "give practical effect to." And the word "fully" means "totally or completely." Webster's New World Dictionary. Sections 251(c) and 271 will be "fully implemented," therefore, when a practical effect results: namely, when ubiquitous and durable local competition *actually exists* and the incumbents no longer control bottleneck facilities.[53] The requirements of sections 251(c) and 271 are not fully implemented, according to the plain meaning of those terms, where, as is the case today, local competition remains nascent. Because there is no sustainable construction of section 10(d) under which the "fully implemented" requirement could be found satisfied, the Commission has no authority to grant Qwest's request for forbearance from Section 251(c)(4).

IV. ANY RELIEF GRANTED TO QWEST MUST PROTECT BOTH WHOLESALE AND RETAIL COMPETITION

As shown above, Qwest retains a monopoly in the market for wholesale DSL transmission, and the limited presence of cable companies as broadband internet access providers to end users suggests, at best, a *potential* duopoly in the retail broadband market. The courts and the Commission have routinely rejected duopoly as a sufficient basis to promote vigorous competition between carriers and to protect consumers.[54] Thus, the Commission should deny Qwest's Petition in its entirety. If, however, the Commission were to grant Qwest some form of limited relief based on the existing level

[53] *Cf. Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 532, 538 (2002) (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

[54] *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 880-82 (2004).

of retail broadband competition, it must ensure that any such relief will not impede the fair and efficient operation of *both* the wholesale and retail markets and that it will further the pro-competitive purposes of the Telecommunications Act by promoting the development of broadband services, applications, and content. Accordingly, any relief the Commission grants must ensure that wholesale DSL transmission is available to competitors on just, reasonable, and non-discriminatory rates, terms, and conditions, and that Qwest cannot subject non-affiliated broadband providers to price squeezes or other anti-competitive conduct. This is essential, because the Internet has flourished precisely because of its openness. Confidence in the fact that customers will continue to have unimpeded access to Internet content (subject to legitimate law enforcement and public interest concerns) has given content providers the incentive to invest heavily in developing and delivering unique applications and services. Thus, an open access model is essential to promote the full and expeditious development of the broadband services, capabilities and applications.[55]

To achieve the vital goal of ensuring an open Internet, the Commission must impose targeted "conduct" requirements on any relief it grants in order to prevent Qwest from using its control over critical broadband transmission facilities anticompetitively

[55] AT&T's vision of an open Internet is wholly consistent with the notion of the "Four Freedoms of the Internet" articulated by Chairman Powell. The Four Freedoms are: (1) the freedom to access Internet content; (2) the freedom to use applications; (3) the freedom to attach personal devices; and (4) and the freedom to obtain service plan information. *See* "Preserving Internet Freedom: Guiding Principles of the Industry," Remarks of Michael K. Powell, Chairman, Federal Communications Commission, Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," University of Colorado School of Law, Boulder, Colorado, February 8, 2004.

and to foster unimpeded access to broadband services and applications. First, it must forbid Qwest (and any entity receiving similar relief) from impeding end users' ability to access the Internet content of any applications provider, except where such access would threaten the integrity of the network or where required by law. In order to assure such customer control, the Commission must not only forbid Qwest from blocking outright access to particular broadband services and applications, but it must also to prevent Qwest from giving any kind of preferential access to its own broadband services and applications, or from degrading access to rivals' broadband services and applications.[56] These conditions are essential to ensure that subscribers will be able to choose the broadband applications that they want to access, not the applications preferred by Qwest and imposed as a result of its control over essential last-mile facilities.[57]

Second, the Commission must prohibit Qwest from refusing to sell broadband Internet access to customers that do not purchase another service, such as traditional voice service, from the carrier.[58] Allowing an ILEC to engage in such practices threatens to devastate nascent broadband services and applications (such as VoIP services) that, as

[56] Thus, for example, to the extent that a broadband access provider deploys "quality of service" routing that would give priority to voice packets when there is network congestion, the Commission should make clear that network owners must make those identical capabilities available to all unaffiliated broadband services providers, such as VoIP providers, on the same basis as they provide those capabilities to themselves or their affiliates. Similarly, network providers should not be permitted to favor the transmission of their own data packets over unaffiliated providers' data packets.

[57] AT&T emphasizes that it is *not* seeking here the "open access" leasing of last-mile broadband transmission facilities that the Commission is considering in its cable modem dockets.

[58] Although Qwest voluntarily offers "naked DSL" at this time, the continuation of such a service offer must be ensured by a specific Commission requirement.

the Chairman recently recognized, might otherwise pose a direct threat to the incumbents' local monopolies.[59] To prevent such market power abuses, the Commission must subject any relief to a specific requirement that forbids Qwest from requiring subscribers to purchase any additional as a condition of obtaining broadband Internet access service.[60]

Finally, the Commission must condition any relief on a requirement that Qwest offer wholesale mass-market xDSL transmission to retail competitors, subject to dominant carrier tariff regulation, including cost support requirements, for every xDSL retail mass-market offer that Qwest makes available to end users. And it must also require Qwest to continue to make the wholesale mass-market transmission available to competitors coextensively with the retail mass market xDSL offer, *i.e.*, on the same de-averaged basis as the retail service. To ensure that this wholesale DSL offer fully enables DSL competition, the Commission must further require Qwest to impute the cost of its wholesale DSL service into any DSL service that Qwest makes available to end

[59] *Powell Says FCC Is Devising Ways To Deal With 15% Problem*, Communications Daily (May 5, 2004) ("If you're a big incumbent and you sort of enjoy the competitive advantages of being the owner of that kind of service system, you, in my opinion, ought to be terrified [of VoIP]").

[60] These targeted requirements would not, of course, prohibit legitimate bundling arrangements that offer customers the *option* of buying broadband Internet access service and broadband service (such as VoIP or any other broadband service or application) together at a single price, so long as the broadband transport provider also offered Internet access services as a stand-alone service at a just and reasonable price.

users at retail.[61] These conditions are essential to preclude Qwest from engaging in price squeezes or other anticompetitive activity.

V. CONCLUSION

For the reasons set forth above, the Commission should deny the Petition.

Respectfully submitted,

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January 5, 2005

[61] These requirements would apply, for example, to Qwest's retail "naked" DSL offer. Petition at 3-4.

CERTIFCATE OF SERVICE

I hereby certify that on this 5th day of January, I caused true and correct copies of "Opposition of AT&T to Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) Pertaining to xDSL Services" via electronic mail on the parties listed on the attached service list.

Dated: January 5, 2005

/s/ Karen Kotula
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Attachment 1